No. 89-1590

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

against

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent mischaracterizes the holding of the Second Circuit in *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986) in an effort to buttress its claim that the issue presented here has already been decided by this Court in *Gilbert* (Brief of Respondent, p. 9). It claims that, under *Gilbert*, ERISA preempts any law that requires employers to make cash payments, other than pure wages, to employees. Its reading cannot withstand analysis.

The Second Circuit did not hold in *Gilbert* that N.Y. Lab. Law § 198-c (McKinney 1986) is preempted by ERISA.[1] *Gilbert* decided only that § 198-c is preempted to the extent it was applied to require an employer to comply with its agreement to pay severance pay.[2] Therefore, at most, *Gilbert* merely stands for the proposition that a state may not require an employer to pay an ERISA-covered benefit. The case simply may not be interpreted as GE argues to preclude the State from enforcing a law that requires an employer to pay employees on a public work project an amount equal to the cost of prevailing benefits, but does not require provision of the benefits themselves. That is the issue presented in this case.

Moreover, the respondent's interpretation of *Gilbert*, if accepted, would create a direct conflict between that case and this Court's decision in *Massachusetts v. Morash*, — U.S. —, 109 S. Ct. 1668 (1989) where the Court upheld a state law,

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[1] Section 198-c makes it a misdemeanor for an employer to fail to pay workers the "benefits or wage supplements" which it has agreed to pay. N.Y. Lab. Law § 198-c(1). Benefits and wage supplements include "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." N.Y. Lab. Law § 198-c(2).

[2] In *Gilbert*, the plaintiffs and the plaintiff-intervenor New York State Commissioner of Labor argued that a promise by an employer to pay severance pay out of general assets was not an ERISA plan. The Second Circuit disagreed because ERISA was intended to cover benefit payments which involve a risk beyond that of ordinary wage payment.

> "[A]n employer faced with the loss of many employees may owe a large amount in severance pay, increasing the risk that it might default on its severance pay obligations because of a lack of funds. This financial loss to employees is a primary concern of ERISA."

Gilbert v. Burlington Industries, Inc. 765 F.2d at 326. (citation omitted.)

virtually identical to N.Y. Lab. Law § 198-c, which requires employers to pay accrued vacation pay due to an employee. Although vacation pay, like severance pay, is a benefit listed in ERISA's definition of an employee welfare benefit plan, 29 U.S.C. § 1002(1), the Court held that ERISA did not preempt a state from enforcing an employer policy to pay workers for unused vacation time. Such a policy was held not to be an ERISA plan because ordinary vacation payments "do not depend on contingencies outside the employee's control," [and, therefore,] "present none of the risks that ERISA was intended to address." *Id.* at 1673. *Gilbert*, therefore, may not be read to settle the issue of whether any cash payments (other than severance pay) which are not pure wages constitute an employee benefit plan under ERISA.

GE is also in error in arguing that the issue presented "has been settled by this Court in a way contrary to the position urged by the Department . . .," citing *Local Union 598 Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J. A. Jones Constr. Co.*, 846 F.2d 1213 (9th Cir.), *aff'd mem.*, — U.S. —, 109 S. Ct. 210 (1988). A summary affirmance, while a ruling on the merits, is not to be given precedential effect beyond the precise issue presented and necessarily decided by such actions. *See e.g., Hicks v. Miranda*, 422 U.S. 332 (1975). The issue presented in *Jones*, whether a state may

require a public work contractor to contribute to an ERISA benefit plan, is not present in this case.

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